No. 10542

In the United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the District of Oregon.

HON. CLAUDE MCCOLLOCH, *District Judge.*

FRANCIS R. STARK,
60 Hudson Street, New York, N. Y.
SIMON, GEARIN, HUMPHREYS & FREED,
EDGAR FREED,
1111 Failing Building, Portland, Oregon,
WILLIAM L. JOSSLIN,
602 Pacific Building, Portland, Oregon,
Attorneys for Appellant.

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
ROBERT T. MAUTZ,
Board of Trade Building, Portland, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND

FILED
JAN 3 - 1944
PAUL P. O'BRIEN,

SUBJECT INDEX

AUTHORITIES

Page

Rules of Civil Procedure (See Appendix):

Law Reviews:

Cases:

Page

Cases: (*Continued*)

No. 10542

In the United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN UNION TELEGRAPH COMPANY,
a corporation,

Appellant,

vs.

I. BROMBERG,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States for the District of Oregon.

Hon. Claude McColloch, *District Judge.*

STATEMENT OF THE CASE

This is an appeal from a judgment rendered by the Hon. Claude McColloch sitting without a jury in favor of the appellee in an action brought by him against appellant to recover for personal injuries sustained by appellee as a result of being knocked down by appellant's employee.

For the sake of clarity, we shall refer in this brief to the appellee as Mr. Bromberg, to the appellant as Western Union and to the appellant's employee as Genevieve Cline.

The accident occurred on June 1, 1942. At that time Mr. Bromberg was 86 years old. He resided at the Congress Hotel in Portland, Oregon. (Tr. 52)

On the date in question Mr. Bromberg desired to secure his mail at the main desk of the hotel. When he approached said desk, Genevieve Cline, a messenger employed by Western Union, was at the desk transacting business with the clerk on behalf of her employer. She was either delivering or picking up a telegram. She was wearing a Western Union coat. (Tr. 53, 55, 56)

Mr. Bromberg stopped to the rear and a bit to the side of said Western Union messenger waiting his turn to step to the desk and ask for his mail. (Tr. 56, 76) After completing her business with the clerk, Genevieve Cline turned abruptly about and walked directly into Mr. Bromberg, who was a slight man, knocking him to the floor and causing him to suffer personal injuries, including a broken hip. (Tr. 56, 57, 68, 47)

Subsequently, Mr. Bromberg filed an action against Western Union for the personal injuries suffered on account of the negligence of its messenger, Genevieve Cline. Western Union filed an Answer admitting that Genevieve Cline at the time of the accident was its employee acting in the course of her employment for

Western Union and in the furtherance of its business, but denying that Mr. Bromberg was injured or that Genevieve Cline was negligent. (Tr. 70)

Subsequently, Western Union filed an Amended Answer which was the same as its original Answer except that an affirmative defense of contributory negligence was added. (Tr. 5)

The case was ultimately tried before Judge Claude McColloch without a jury. He found that Genevieve Cline was negligent, that she was acting in the course of her employment for Western Union at the time of the accident, that Mr. Bromberg was not guilty of contributory negligence and that Mr. Bromberg was injured. (Tr. 12) Based upon appropriate findings, Judge McColloch rendered judgment in favor of Mr. Bromberg for the sum of $2500.00 general damages and $1760.70 special damages. (Tr. 16)

It apparently is now the contention of Western Union that this case does not involve questions of fact but questions of law and that by reason thereof Western Union cannot be held responsible. Such a contention has no merit whatsoever. Western Union is not only bound by its Answer in which it was admitted that Genevieve Cline was acting in the course of her employment at the time of the accident but her testimony unqualifiedly establishes the point also. Moreover, the pre-trial order which was agreed upon by both parties states that at the time Genevieve Cline was "engaged in the scope of her duties". (Tr. 8)

Thus, this case involved questions of fact, purely and simply, concerning negligence, contributory negligence and injury. With the trial court sitting as a jury and finding in favor of Mr. Bromberg upon these questions of fact, it is difficult to perceive how Western Union can prosecute this appeal with sincerity.

We could, and in order to lighten the burdens of this court probably should, rest this Brief upon Rule 52 (a) of the Federal Rules of Civil Procedure which provides that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

However, in view of the tortured effort of Western Union to escape its lawful liability incurred through the negligence of its employee, we shall endeavor to provide this court with some pertinent authorities supporting the judgment herein.

SUMMARY OF PRINCIPAL POINTS INVOLVED

1. Questions of negligence, contributory negligence and proximate cause are ordinarily questions of fact.

2. An employer is responsible for the acts of its employee committed by the employee while acting in the course of employment and in the furtherance of the employer's business.

3. The fact that the employee is a pedestrian at the time of the accident does not in any way change or alter the employer's liability.

ARGUMENT

We shall confine ourselves herein to those specific points set forth in Appellant's Brief.

WAS GENEVIEVE (CLINE) NEGLIGENT?

Genevieve Cline stood at the main desk of the Congress Hotel in Portland on June 1, 1942, either picking up or delivering a telegram for Western Union. (Tr. 53, 55, 56) After completing her business at the desk, she turned abruptly and almost completely about and walked directly into Mr. Bromberg knocking him to the floor and causing him to suffer serious injuries, including a broken hip. (Tr. 56, 57, 68, 47). Mr. Bromberg was behind her two or three steps according to her (Tr. 56) or about three feet according to appellant's witness, James Lenhart. (Tr. 76) Mr. Bromberg was standing behind her and a little bit to one side. (Tr. 56, 76)

The hotel lobby was of a considerable area and there were no other persons and no posts or pillars or baggage which made it necessary for her to walk into Mr. Bromberg. (Tr. 58, 78) There was "plenty of room" for Genevieve Cline to have walked without coming in contact with Mr. Bromberg. (Tr. 58)

By her own testimony, Genevieve Cline conclusively showed that she must not have kept any lookout at all at the time because although she walked into Mr. Bromberg, she did not know of his presence until the contact and she didn't know whether she was

bumping into a man or a woman. (Tr. 57, 58)

Immediately after the accident and while Mr. Bromberg was being helped up, Genevieve Cline stated, "I am sorry for knocking you down." (Tr. 60, 68)

Under such circumstances how can it be argued that Genevieve Cline was free from negligence as a matter of law?

In *Schediwy vs. McDermott, et al.,* 298 Pac. 107, recovery was allowed the plaintiff who was walking on a sidewalk and was collided with about two and one-half feet from the building line by an employee of a wholesale meat dealer who had just emerged from a side entrance to the market onto the sidewalk. The court said in part as follows:

> "In the absence of a prohibitory statute or ordinance to the contrary a pedestrian upon a lane or walk used by foot travelers (i. e., a sidewalk) has the right to come and go in any direction he or she sees fit and at any pace or gait that may suit the fancy or the aim or purpose of the pedestrian, but the pace and direction must be in accordance with the interest of others who may lawfully be using the sidewalk or lane. A pedestrian must use a degree of care, precaution, and vigilance which the circumstances justly demand. One is bound to anticipate and guard against what usually happens, but is not required to anticipate or guard against what is unusual or unlikely to happen. In this case it was for the jury to determine if such care and vigilance was used. We find evidence that warranted the jurors' view upon this subject.
>
> "Souza was an employee and engaged within the scope of the business of the other defendants

at the time of the accident. They are therefore liable."

In Price vs. Simon, 49 Atl. 689, an iceman in returning to the ice wagon from a house delivery ran into a small child and cut the child's hand and head with the ice tongs. In the ensuing action the plaintiff was nonsuited in the District Court which was affirmed by the Court of Common Pleas of Camden County, New Jersey, but the Supreme Court of New Jersey reversed both lower courts and held that the question was one of fact for the jury. On the basis of the facts mentioned, the court held that the employee's negligence was clearly for the jury and then went on to say in connection with the employer's liability in part as follows:

> "The liability of the master for the negligent act of the servant is solved by determining whether the injury was inflicted while the servant was performing an act in the course of his employment by the master . . . He could not conduct the business in which he was employed without going to the customer's house and returning to the wagon. In doing these acts, he represented the master, and for his negligence the master is liable."

In *Ryan vs. Keane, et al.,* 98 N.E. 590, a stableman while walking across the yard jostled and caused to fall the plaintiff who was also crossing the yard to a wagon which he had hired. The stableman's employers were sued and claimed as does Western Union here that the stableman was not negligent and that in any event they were not responsible for his acts

as a pedestrian. The Supreme Court of Massachusetts in rejecting both contentions stated:

> "The jury were warranted in finding that Boylan was acting within the scope of his employment at the time when he ran into the plaintiff. Probably this would not be questioned if he were driving the horse at the time and drove the wagon against the plaintiff. In the act of returning to the stable he was doing what he was ordered to do, and his purpose was to perform the work of his employer for which he was engaged. He was none the less acting in the course of his employment because his method of performing his duty was careless; and if in hurrying to do his work at a busy hour in the morning he carelessly or wilfully jostled against and injured the plaintiff, the defendants are liable for his act. The evidence does not show that Boylan assaulted the plaintiff wilfully, or that he was actuated by ill will or by a desire to carry out any purpose of his own, and the judge's charge fully protected the rights of the defendants in this regard."

It is to be noted that in the court's statement of the facts in the foregoing case, it is mentioned that the stableman jostled the plaintiff "when he had ample unobstructed space in which to pass."

Recovery was allowed the plaintiff against a railroad company where the plaintiff was injured by a brakeman who ran against and knocked him under a moving train in *Missouri, K. & T. Ry. Co. of Texas vs. Edwards,* 67 S.W. 891.

In fact the principle that a person is liable for his negligent pedestrianism is so firmly ingrained in our jurisprudence that no appeal was taken on be-

half of the servant in a case of this kind occurring on a sidewalk in San Francisco in the case of *Tighe vs. Ad Chong,* 112 Pac. (2d) 20. This decision will be discussed at some length under another point in this Brief.

Western Union also argues that Genevieve Cline was not negligent because the injury to Mr. Bromberg was not foreseeable by her.

It is not necessary in order to bind a person for his negligent act that he foresee the particular injury or result that may obtain. It is sufficient if it could be reasonably anticipated that some injury might result from the act complained of.

The cornerstone case in Oregon on the question of foreseeability and proximate cause is Miami Quarry Company vs. Seaborg Packing Company, 103 Ore. 362, 204 Pac. 492.

In that case the defendant's barge was not securely fastened, keeping in mind the actions of the tide and wind, and as a result broke loose and was carried out of Yaquina Bay past a jetty being constructed therein and into the ocean. The following morning the ocean waves brought the barge back in where it was beached and then towards the jetty and dashed it against the same, damaging the jetty and knocking a pile driver stationed on the jetty into the water where it was completely lost.

In affirming judgment for the owner of the pile driver against the owner of the barge, the Supreme

Court of Oregon stated:

> "Defendant contends that the omissions of which plaintiff complains were not the proximate cause of the injury for which plaintiff seeks damage. In support of this contention, defendant argues that the injury complained of could not have been foreseen or reasonably anticipated by a person of ordinary foresight and prudence, happening as it did, after the barge had floated out to sea without striking the jetty, and after it had been cast upon the beach south thereof; that a reasonably prudent man could not foresee that the action of the wind and waves, in connection with the eddy south of the jetty, would drive the barge, or a section thereof, in a direction opposite to the ocean currents and against the jetty; and that the rough sea and the eddy created by the jetty constituted an intervening cause and the proximate cause of plaintiff's injury and resulting damage.
>
> "1. A widely quoted definition of proximate cause is the following:
>
> > 'The proximate cause of an injury is that cause which in natural and continuance sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred': 22 R.C.L. 110.
>
> "2. It was the duty of the defendant to exercise reasonable care to secure its barge to meet conditions that might naturally be expected, such as high tides, changes of tides and tempestuous weather, rendering the barge liable to float and collide with other craft or structures in its course: 11 Corpus Juris 1095, 1098, and notes. There was evidence that defendant did not fully discharge this duty.
>
> "3. Ordinarily the question of whether a particular act was the proximate cause of the injury

complained of is one for decision by the jury, and it is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of proximate cause becomes one of law for the court: (Citing authority)

"4. In order to constitute a particular act the proximate cause of the injury, it is not essential that the precise injury for which recovery is sought should have been foreseen; it is sufficient if the defendant could have reasonably anticipated that some injury might result from the omission of which complaint is made: 22 R.C.L. 125, 126."

Again in Bevin vs. O. W. R. & N. Co., 136 Ore. 18, 298 Pac. 204, wherein the plaintiff was injured by being struck in the eye by a small particle of rock which glanced from an allegedly defective shovel blade which the plaintiff was using to cut down thistles, the Oregon Supreme Court stated:

"We first inquire: Is there any substantial evidence tending to show that the alleged negligence was the proximate cause of the injury? Ordinarily, the question of proximate cause is for the jury to determine. The court is warranted in withdrawing this issue from the jury only when it can say that no reasonable inference that the alleged negligence caused or produced the injury can be deduced from the evidence. * * * In other words, the court can determine the question of proximate cause as a matter of law only when it can say, after a review of the entire evidence, that no reasonable man would infer from the facts proved that the alleged negligence proximately caused the injury. While it is well established that a jury will not be permitted to enter the realm of speculation or conjecture in deter-

> mining whether the defendant may or may not have been guilty of negligence, it is equally well settled that, after substantial evidence has been offered tending to show negligence, the court will not usurp the province of the jury by weighing probabilities in an effort to determine whether such negligence was the proximate cause."

Other decisions of the Oregon Supreme Court rejecting Western Union's contention are Maletis vs. Portland Traction Company, 160 Ore. 30, 83 Pac. (2d) 141; Kelly vs. Stout Lumber Company, 123 Ore. 647, 263 Pac. 881; Voshall vs. Northern Pacific Terminal Company, 116 Ore. 237, 240 Pac. 891.

While Genevieve Cline may not have anticipated the specific injury that occurred, she might well have anticipated or foreseen some injury to someone when she abruptly turned from the main desk in a hotel lobby and walked directly into another person without seeing him until the moment of contact and without knowing whether that person was male or female, old or young, large or small.

Whether such an act on her part constitutes negligence under the circumstances and whether it is the proximate cause of the resulting injury are questions peculiarly within the province of the trier of the facts. This is true not only in Oregon, as demonstrated by the decisions above cited, but under the overwhelming weight of authority. In fact, it is elementary.

A very late decision in point from this court is *Sundberg vs. Washington Fish & Oyster Co.,* No. 10,394, decided November 8, 1943.

In order to ascertain what actually transpired at the time of this accident the trial court had Genevieve Cline demonstrate not only the positions which she and Mr. Bromberg were in at the times involved (Tr. 56) but also the manner in which she bumped into him. (Tr. 64) This is real or demonstrative evidence that of course is impossible for an appellate court to have before it but nevertheless must be given due weight in determining the propriety of the finding made by the trier of the fact.

In a case in which the issue of negligence depended upon whether the defendant had provided a suitably safe eyebolt when a hook connected thereto gave way causing injury to a seaman on a barge, the eyebolt in question was exhibited to the jury in open court during the trial but was not before the appellate court on appeal. In affirming a judgment for the plaintiff the Circuit Court of Appeals for the Third Circuit stated:

> "The questions of whether or not the eyebolt was defective, and, if it was, whether or not that defect caused the hook to break, which resulted in the plaintiff's injury, as well as the question of contributory negligence of the plaintiff, were submitted to the jury. The defendant contends that there was no testimony from which the jury could draw the conclusion that the condition of the eyebolt could have caused the hook to break, and even if the eyebolt was bent over, so that only the end of the hook could enter it, and the hook was not seated in its normal position in the eye, the testimony does not justify the conclusion that the hook would have broken more easily in that position than if it had entered the eye fully and

properly to its normal position.

"This contention does not take into consideration the 'real evidence' in the case. The jury had before it the hook, and the testimony as to how it was fastened in the eyebolt, and could readily draw its own conclusion. In addition to the usual methods of establishing facts by direct or positive evidence and circumstantial evidence, there is that of 'self-perception or self-observation.' We have three classes of evidence: (1) Direct or testimonial evidence; (2) indirect or circumstantial evidence; (3) autoptic preference, or real evidence. Greenleaf on Evidence (16th Ed.) vol. 1, § 13a; Wigmore on Evidence, § 1150 et seq.

'In a great measure proof of this means (autopic preference or real evidence) may be more potent than by any other evidence.' The Modern Law of Evidence by Chamberlayne, § 3588.

'Inspection is like admission, in that, while not testimony, it is an instrument for dispensing with testimony, and, in a doubtful case, the class of testimony it dispenses with might be a controlling circumstance.' Gaunt v. State, 50 N. J. Law, 490, 495, 14 Atl. 600, 603.

"The jury had the hook and eyebolt before it, and, being composed of men of common sense and experience, could determine for itself whether or not it was broken because it could not fully and properly enter the eye. It was thus not wholly dependent upon what was said about the hook and eyebolt."

Philadelphia & R. R. Co. vs. Berg, 274 Fed. 534. Certiorari denied, 257 U.S. 638, 66 L. Ed. 410, 42 Supreme Court 50.

Moreover, at the request of counsel for Western Union, Judge McColloch viewed the scene of the accident. (Tr. 26) This enabled him "better to compre-

hend the evidence adduced upon the trial and apply the testimony to the issues."

State vs. Sing, 114 Ore. 267, 229 Pac. 921.

After hearing the evidence, viewing the premises and having the scene re-enacted by Western Union's own employee, the trial court found, in part, as follows:

> "That on said date and prior thereto the plaintiff, an elderly man, resided at the Congress Hotel, in Portland, Oregon. On said date the said Genevieve Cline while engaged in the scope of her duties for the defendant was standing at the main desk in the lobby of said hotel, either picking up or delivering a telegram or other message of some sort. The plaintiff at said time was standing to the rear of the said Genevieve Cline, either directly behind her or a bit to one side, and was waiting to step to said main desk and ask for his mail. After leaving her position at said hotel desk, as aforesaid, the said Genevieve Cline made an abrupt turn and walked directly into and against the plaintiff, knocking him to the floor of the lobby of said hotel.
>
> "That the defendant by and through the said Genevieve Cline at said time and place was careless, reckless and negligent in abruptly turning from said hotel desk and walking directly into and against plaintiff. That there was ample and sufficient room and space for the said Genevieve Cline to have proceeded on her way in said hotel lobby without coming in contact with the plaintiff had she been keeping a proper lookout and exercising due care for the rights of others in said hotel lobby and particularly the plaintiff." (Tr. 14)

Rule 52 (a) of the Rules of Civil Procedure following Section 723 of Title 28, U.S.C.A. provides that,

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

> "It must be borne in mind that the court below was exercising the functions of a jury, and its findings are of the same force and effect as though the same were embodied in a jury's special verdict, 28 U.S.C.A. § 773, and cannot be disturbed when there is substantial evidence tending to support the finding . . . .
>
> "We are bound by this finding unless the same is clearly erroneous. (Citing Federal rule and interpreting decisions.)"

Luzier's Inc. vs. Nee, 106 Fed. (2d) 130.

This court stated in a recent decision:

> "As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U.S. 350, 353, 37 Supreme Court 169, 170, 61 L. Ed. 356 (Citing Davis v. Schwartz, 155 U.S. 631, 636,, 15 Supreme Court 237, 39 L. Ed. 289), the case is preeminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable'."

Wittmayer v. U. S., 118 Fed. (2d) 808.

Some of the many other cases in which this court has had occasion to strictly apply and follow the rule under discussion are as follows:

Cherry-Burrell Co. et al. vs. Ray C. Thatcher, 107 Fed. (2d) 65.

Occidental Life Insurance Company vs. Thomas, 107 Fed. (2d) 876.

Maryland Casualty Company vs. Stark, 109 Fed. (2d) 212.

Gates vs. General Casualty Company, 120 Fed. (2d) 925.

We earnestly submit that the findings made by the trial court instead of being clearly erroneous were the only findings fairly and reasonably to be made from the evidence.

WAS MR. BROMBERG NEGLIGENT?

At the time of this accident Mr. Bromberg was an aged man. He had passed his 86th birthday but had not yet attained 87. He walked with a cane. At times he shuffled and he walked slowly. His hearing was not as good as one of fewer years and as his had once been.

Because of these circumstances Western Union would contend, as we view its theory, that Mr. Bromberg should become a recluse, that he should separate himself from any daily activity of any kind and confine himself so that Western Union messengers wouldn't be exposed to the possibility of knocking him down and hurting him.

Although he was an aged man at the time of this accident, he was rather a remarkable man for his years before he was injured. He continued to main-

tain an office with an insurance company and he walked to this office from his hotel several times a week. (Tr. 28, 29) He was alert mentally. (Tr. 29) He lived alone at the Congress Hotel and he continued to be active in organizations and he attended their meetings. (Tr. 27, 28)

On the day of the accident he went to the lobby of the hotel which was his home and proceeded to the main desk to call for his daily mail. He observed there a young lady who was ahead of him and he stood behind her and a bit to one side until it was his turn.

We have already pointed out earlier in this Brief that Genevieve Cline thought he stood two or three steps behind her and slightly to the side. (Tr. 56) Western Union's witness, James Lenhart, said Mr. Bromberg stood about three feet behind Genevieve Cline and a bit to one side. (Tr. 76)

Does this conduct on the part of Mr. Bromberg spell negligence as a matter of law? What should he have done, stood ten feet behind Western Union's messenger? Should he have tapped her on the shoulder and said, "Don't walk into me and knock me down. Please be careful."?

Mr. Bromberg did what any intelligent, reasonable person would have done. He stood sufficiently behind Genevieve Cline so as not to interfere with her or impede her in leaving and yet close enough to the desk that he could gain the clerk's attention by step-

ping forward a few feet when the clerk had finished with Genevieve Cline. The Supreme Court of Oregon has stated:

> "No person or class of persons has an exclusive right to the use of the streets. Public thoroughfares are for the beggar on his crutches as well as the millionaire in his limousine. Neither is it the policy of the law to discriminate against those who suffer physical infirmities. The blind and the halt may use the streets without being guilty of negligence if in so doing they exercise that degree of care which an ordinarily prudent person similarly afflicted would exercise under the same circumstances."
>
> Weinstein vs. Wheeler, 127 Ore. 406, 257 Pac. 20, 271 Pac. 733.

This decision of course pertained to streets and to a blind man thereon. Mr. Bromberg was merely an old man with some of the natural infirmities of old age, and he was in his home, the lobby of the hotel in which he was a permanent resident.

After hearing the evidence in the case and after having Genevieve Cline demonstrate with a court attache the position of Mr. Bromberg and herself at the time (Tr. 56), the trial court found:

> "That at said time and place the plaintiff was not guilty of any negligence." (Tr. 14)

In Oregon and generally contributory negligence is a question for the jury or the trier of the fact.

> "This court has held over and over again that where there is a dispute as to the facts or where minds might draw different conclusions the question of contributory negligence is for the jury."

Simms vs. Friede Investment Company, 125 Ore. 300, 266 Pac. 910.

"The trial court did not err in submitting the issue of contributory negligence to the jury. We see no need of reviewing authorities on such question. The law in reference thereto is well settled. It is in the application of the law to a particular factual situation that difficulty often arises, and, of course, the decision in each case hinges upon the particular facts involved."

Whisler vs. U. S. National Bank of Portland, 160 Ore. 10, 82 Pac. (2d) 1079. See also Saylor vs. Enterprise Electric Company, 110 Ore. 231, 222 Pac. 304, 223 Pac. 725; Massor vs. Yates, 137 Ore. 569, 3 Pac. (2d) 784; Callaway vs. Moseley, 131 Fed. (2d) 414.

The defendant has the burden of pleading and proving contributory negligence. It is an affirmative defense. The trial court held that the defense had not been proven, that Mr. Bromberg was not contributorily negligent.

The trial court's finding in that regard was clearly proper under the evidence and was not erroneous in any way.

THE RULE IN THE PHILLIPS CASE

In its desperate effort to escape responsibility herein, Western Union cites the case of Phillips vs. Western Union Telegraph Company, 195 S.W. 711, a Missouri decision that has "no pride of ancestry and no hope of posterity". In that case a messenger boy employed by Western Union ran along a sidewalk in

St. Louis and said to a newsboy, "Give me a paper." The newsboy refused and the messenger boy snatched one from the bundle and ran looking back over his shoulder and while doing so collided with the plaintiff knocking her to the pavement and injuring her.

The Supreme Court of Missouri might very well have exonerated the employer in that case because the messenger in stealing a newspaper and running away from the newsboy was certainly not engaged in the course of his employment but was on a "frolic of his own."

However, without resting its decision on this theory alone, the Supreme Court of Missouri went on to say that since the messenger boy was on a public street not by permission of the employer but in the exercise of a public right and since he was using his own legs and not a horse or automobile of the employer, there would be no liability on the employer's part for the messenger boy's negligence.

This case so far as we can ascertain has never been followed except in one case by the Missouri Court of Appeals, which being an inferior court, felt that it had no alternative but to follow the rule laid down. In doing this, however, the court stated:

> "Whether the doctrine of the Phillips case is sound or unsound is not for this court; it is controlling, notwithstanding holdings in other jurisdictions to the contrary."
>
> Ritchey vs. Western Union Telegraph Company, 41 S.W. (2d) 628.

In Chiles vs. Metropolitan Life Insurance Company, 91 S.W. (2d) 164, the Kansas City Court of Appeals states:

> "The Phillips case, supra, has never been directly overruled. Still there is language in later decisions of the Supreme Court that we must accept as the last ruling case on the point involved that, at least by implication, overrules the Phillips case as applied to the fact as it appears in the case at bar."

In *17 St. Louis Law Review 279,* speaking of the Phillips case, it is said:

> "The case is interesting in presenting the view that a master's vicarious liability under the rule of respondeat superior will not result from an act performed by the servant in a method or manner incident to his rights as a public citizen * * * To preclude the vicarious liability of the master because a servant makes use of the public right, to which use the master gives the original impetus, would unduly narrow the operation of the rule of respondeat superior."

In *27 Washington University Law Review 122,* in commenting on the Phillips case, it is stated:

> "The reason announced for this decision by the court is difficult to justify. It has been pointed out by high authority and sustained, in effect, by the cases in other jurisdictions that scope of the employment is not dependent on time or place, but rather on the connection of the act with the employment."

In *Tighe vs. Ad Chong,* 112 Pac. (2d) 20, which was a sidewalk accident involving two pedestrians, the employer sought to invoke the protection of the Phil-

lips case. The California court, however, rejected this untenable theory and stated in part as follows:

> "For several reasons the rationale of the Missouri cases (referring to the Phillips and the Ritchey cases) cannot be followed . . . .
>
> "From the foregoing it will be seen that even in Missouri there appears to be some doubt as to the soundness of the decision in the Mrs. Phillips case, and besides it is conceded that the legal doctrine upon which it is founded is contrary to the one adhered to in other jurisdictions."

In the Tighe case recovery was permitted against the employer whose employee negligently walked into another pedestrian on a sidewalk causing injury to such pedestrian. As to the employer's liability under such circumstances the court stated in part:

> "Quite to the contrary, the law is well settled that in determining the question of respondeat superior the real test to be applied is whether at the time the employee commits the negligent act resulting in the injuries to the third person, he is engaged in performing some duty within the scope of his employment."

The court should keep in mind that while probably overruled and certainly rejected in all other jurisdictions, the Phillips case applies only to an accident occurring on a public sidewalk where the employee according to said decision is exercising a public right.

The Supreme Court of Missouri in a very recent case where the negligent pedestrian was a messenger for Dun & Bradstreet and injured another person in

the entrance of a building owned by the Southwestern Bell Telephone Company, strictly confines the Phillips case to sidewalk accidents. While pointing out that the Phillips case is probably not good law, nevertheless it is not applicable in any event where the employee was not on a public sidewalk but upon private property, even though it is not the employer's premises. *Salmons vs. Dun & Bradstreet,* 162 S.W. (2d) 245.

By the same token, if this court should see any merit whatsoever in the holding of the Phillips case, that would not in any way affect the case at bar because the employee involved herein was not on a public sidewalk but was on private property, to-wit: a hotel lobby where she had gone under the direction of her employer and for no other purpose whatsoever. (Tr. 55)

Although not applicable here, the Phillips case is not good law even in sidewalk cases and the Supreme Court of Missouri itself in the Salmons case says that its research reveals "that the case stands alone, except for Ritchey vs. Western Union Telegraph Co., supra, so far as concerns the notion that the fact that the messenger boy was on foot and on the sidewalk at the time of injury to plaintiff, would affect the application of the principle of respondeat superior."

In legal principle, the Phillips case cannot be reconciled with the following decisions:

Salmons vs. Dun & Bradstreet, 162 S.W. (2d) 245.

Tighe vs. Ad Chong, 112 Pac. (2d) 20.

Schediwy vs. McDermott (supra), 298 Pac. 107.

Price vs. Simon (supra), 49 Atl. 689.

Ryan vs. Keane (supra), 98 N.E. 590.

Mo., K. & T. Ry. Co. of Tex. vs. Edwards (supra), 67 S.W. 891.

EXCESSIVE SPECIAL DAMAGES

Western Union finally complains that Mr. Bromberg prayed for recovery of special damages in the sum of $1413.70 in his complaint and was given judgment in the sum of $1760.70 and that the difference in the two sums makes the amount awarded excessive.

It is not claimed that Mr. Bromberg did not prove special damages in the sum of $1760.70, and it could not be so claimed because he did prove special damages in this amount without objection. (Tr. 32-35, 49-52)

The Federal Rules of Civil Procedure provide for just such a situation. Rule 15 (b) provides in part as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but

failure so to amend does not affect the result of the trial of these issues."

Rule 54 (c) provides:

> "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

COMMENT

There are some statements contained in Western Union's Brief which are not accurate. Although probably unnecessary, we wish to call one or two of such statements to the Court's attention so that the Court will not be in any way misled.

For example it is stated on Page 8:

> "and she (Genevieve Cline) had walked on a distance of ten feet before she heard him cry out."

Genevieve Cline did not testify to anything whatsoever which would justify such a statement. In fact, in examining the record, the Court will learn she did not testify at any time that she heard Mr. Bromberg cry out. Western Union has taken from the completely discredited testimony of the witness, James Lenhart, the absurd statement that Genevieve Cline was at least ten feet away from Mr. Bromberg when he fell down and from that conceived the inaccurate and erroneous statement above quoted.

In reading the record the Court will also learn why the testimony of the witness, James Lenhart, was discredited by the trial court. (Tr. 79-87, 111-116 inc.)

Western Union states in its Brief:

"that Genevieve came in contact with Mr. Bromberg in the very act of turning away from the desk"

and again

"but thought she brushed Mr. Bromberg before she had completely turned around . . . ."

We quote from the record:

"Q. And where was Mr. Bromberg at that time when you turned around?

A. Well, Mr. Bromberg was behind me and slightly to the side.

Q. About how far from you?

A. Well, I don't know exactly.

Q. Well, just your best judgment?

A. Oh, about two or three steps.

Q. Two or three steps?

A. Something like that.

Q. And then did you start moving away from your position at the desk?

THE COURT: I will tell you the best way to do that would be to show me. Mr. Joy, you come and stand behind her. You come down here and face like you were facing the desk. You just take any position there, a little further up. About how far behind (35) you? Where should he be?

A. He was a little closer than that, I would say. (Mr. Joy changes his position.) Mostly like that, yes.

THE COURT: About that way behind you, or a little more to your side?

A. Just about like that, yes.

THE COURT: All right. Thank you.

MR. MAUTZ: Q. And then when you moved away from the desk did you start running?

A. No, I didn't.

Q. You started walking? A. Yes.

. . . . . (Tr. 56, 57)

Q. Was there anybody else in the vicinity?

A. No.

Q. There wasn't anybody else there, was there?

A. No, sir.

Q. And it is quite a large area there in the lobby?

A. Yes.

Q. In other words, there was plenty of room for you to have walked without having any contact with Mr. Bromberg, wasn't there?

A. Yes, there was.

Q. But then in walking away from the desk you did have a contact with him?

A. Yes, I did.

Q. And as a result of that contact he went to the floor, didn't he? A. Yes." (Tr. 58)

This testimony and the actual demonstration given by Genevieve Cline clearly showed that she walked into Mr. Bromberg and not that she "brushed" against him in the act of turning from the desk. We have already quoted the finding on this point by the trial court. (Tr. 14)

Finally, counsel seems to get some comfort from the fact that Mr. Bromberg's memory was so confused as a result of this accident that he was not able to tell a coherent story as to just how the accident happened. Suppose Mr. Bromberg had been killed as a result of this accident and could not have told any story? Would Western Union contend that

no case could be made out against it by other evidence such as the testimony of its own employee if Mr. Bromberg's lips were thus sealed by death?

Before this accident Mr. Bromberg's mental condition and his ability to remember and tell what was going on was good. He was very alert. (Tr. 29) After this unfortunate accident there was a very perceptible change in his mental attitude and his memory became vague and there was a marked difference in his mental condition. (Tr. 29, 30, 42, 44, 45)

We appreciated better than anyone else that Mr. Bromberg had failed so that he was unable to tell how the accident actually happened. That is why we called Genevieve Cline as a witness. We would have had to do the same if Mr. Bromberg had been killed. Since the evidence which we did introduce, however, made out a case against Western Union, the fact that Mr. Bromberg's testimony might have been "vague, indefinite, contradictory" as claimed by Western Union, does not defeat his recovery.

Martinelli vs. Poley, et al., 292 Pac. 451.

Primm vs. Market Street Railway Company, 132 Pac. (2d) 842.

CONCLUSION

It is respectfully submitted, and we feel further argument and discussion thereon would be redundant, that this appeal is manifestly without merit and that the judgment herein should be affirmed.

Respectfully submitted,

WILBUR, BECKETT, HOWELL & OPPENHEIMER,
ROBERT T. MAUTZ,
Attorneys for Appellee.

ADDENDUM

Since sending Appellee's Brief to the printer we have read the interesting and highly pertinent case of Hobba vs. Postal Telegraph-Cable Company, 141 Pac. (2d) 648, decided September 27, 1943.

The facts are set forth in this decision as follows:

> "The appellant had in its employ two messenger boys, Eugene Allison and Zene Whipple. At the time of the injury to respondent, both boys were dressed in uniforms supplied by appellant. About 4 o'clock in the afternoon of the day in question, Whipple returned from a trip he had made with another messenger, and he was standing on the public sidewalk in front of appellant's telegraph office on the east side of Howard Street, in the city of Spokane. At that time, Allison came out of the office, charged with the duty of going on foot on an errand which would

take him to the place of business of the Spokane Chronicle and from there to the store of the J. C. Penney Company, on Riverside avenue. The ordinary and usual route of travel by foot would be to go south from the telegraph office to Sprague avenue and either cross Howard at its intersection with Sprague, or continue south and cross Sprague, and thence west.

"When Allison came out of the telegraph office, he stopped in front of Whipple, and, in a friendly manner, struck him on the chest, and then ran south along the sidewalk towards Sprague. Whipple followed in pursuit. Meanwhile, respondent and a woman companion were traveling east and crossing Howard along the north side of Sprague, with the intention of taking passage on a bus at the northeast corner of the intersection of these streets. As respondent stepped from the street to the sidewalk, she was slightly in advance of her companion. The boys were then advancing, both running, and Whipple had seized Allison by either the shoulders or neck. Both of the boys, while in this position, negligently and violently collided with respondent, causing her to fall, from which she sustained severe injuries."

The telegraph company defended on virtually the same grounds as does Western Union herein, including the theory of the Phillips case.

In the lower court the jury returned a verdict for the defendant but the court granted the plaintiff's motion for a new trial. The defendant appealed and the issue on appeal was whether the evidence was sufficient to take the case to the jury as to the responsibility of the telegraph company. In holding that the case was for the jury the Supreme Court of Washing-

ton sitting en banc, after reviewing the theory of the Phillips case, unanimously held:

> "In approaching the problem involved here and upon the factual situation outlined above, one may feel that a distinction can and should be made between a case where the employee uses some instrumentality in his work, such as an animal or a vehicle, which, if not properly managed or operated, will do injury to others, and one where the employee travels on foot. But in each kind of case the employer has some sort of work which he wants done. It is for his benefit. He either cannot or does not desire to do it himself. He employs someone to do it for him. The doing of the work necessitates travel from the employer's place of business to some other location. The employee, while actually doing the assigned work, does a negligent act which causes injury to another who is not in any way at fault.
>
> "Thus far, we have no hesitancy in saying that the employer is liable in damages to the injured person. Now, is there any logical reason why the same result should not follow whether the negligent act consists in the manner of driving the animal or operating the vehicle or in the manner of self-locomotion? The result to the injured person is the same. If the employer chooses to have the work done by another, he must be held responsible to others for the negligent conduct of his employee while doing the work, or else he should do the work himself. We think that if we try to draw a distinction between the different methods of locomotion that might result in injury to others, we not only misapply the doctrine of respondeat superior, but also forsake it entirely.
>
> "So, it appears to us that both the reasoning and the application of the principles of law governing the relationship of employer and employee as to third parties in the cases cited by respond-

ent are sound and should be adopted in this case. It was upon these principles that the case was tried and submitted to the jury by the lower court, and they should be followed in any new trial that may be had.

"The trial court was not in error in denying the motion for a directed verdict and in granting the motion for a new trial."

Thus, we have a recent decision making the liability of the telegraph company a question of fact where its messenger boys negligently collide with a member of the public while they are pedestrians and even while they are skylarking on a public street, but apparently at the same time on their way to deliver a message.

How much stronger is the case at bar where there is no skylarking and where the messenger is clearly and admittedly in the course of her employment in a hotel lobby.

APPENDIX

RULES OF CIVIL PROCEDURE

Rule 15 (b):

AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence.

Rule 52 (a):

EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside

unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

Rule 54 (c):

DEMAND FOR JUDGMENT. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.